MADISON V. ALABAMA: THE UNFULFILLED PROMISE OF *FORD*

ABSTRACT

In 1986, the U.S. Supreme Court's decision in *Ford v. Wainwright* set forth the standard that executing a defendant suffering from a mental illness is against the Eighth Amendment. Despite the Court's holding, this standard is not consistently followed. Vernon Madison, the defendant in *Madison v. Alabama*, suffered from dementia but sat on death row for multiple decades. Dementia is a major neurocognitive disorder that affected at least one of Madison's cognitive domains. Madison's dementia further affected his central role of cognition so that he lacked an understanding and comprehension of his daily activities and actions. Without comprehension of his day-to-day life, it is likely Madison did not comprehend his death sentence. As ruled in *Ford*, defendants with diagnoses such as Madison should be exempt from the death penalty.

This Comment first argues that judges are unfit to determine a defendant's competency for execution because they lack the training and expertise of mental health professionals. Then this Comment transitions to an analysis that explores whether subjecting defendants to the death penalty causes mental illness, because defendants sentenced to the death penalty have a high likelihood of developing a mental illness. Finally, this Comment argues that the U.S. Supreme Court should adopt a categorical rule based on diagnoses of mental illness that impair one or more cognitive domains, such as dementia, so that courts will be best equipped to comply with the Eighth Amendment and *Ford*. This rule is appropriate because a diminished cognitive domain impedes the mental action or process of acquiring knowledge and understanding through thought, experience, and senses. As such, this Comment argues that a diminished cognitive domain should create a rebuttable presumption that the defendant lacks a rational understanding of the reasons for his death sentence. Employing this categorical rule would mean that as soon as a defendant is diagnosed with a mental illness where a cognitive domain is impaired, the defendant, as a matter of law, is deemed to lack a rational understanding and is incompetent for execution.

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INTRODUCTION

Ford v. Wainwright[1] established that executing a defendant suffering from a mental illness[2] is against the Eighth Amendment,[3] yet, the U.S. Supreme Court's recent decision in *Madison v. Alabama*[4] mistreated the *Ford* holding by subjecting Madison, a defendant with a major neurocognitive disorder, to death row.[5] The Court held in *Ford* that the Eighth Amendment prohibits the execution of one who is "insane." However, the defendant must make a "substantial threshold showing of insanity."[6] *Ford* set forth the standard that a person is considered "insane" for purposes of execution, and therefore not competent for execution, if they are "unaware of the punishment they are about to suffer and why they are to suffer it."[7] The *Ford* Court reasoned that executing an insane defendant "provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment."[8] Furthermore, the retributive value of capital punishment is unserved when the state executes "a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."[9]

Additionally, the *Ford* Court held that a defendant is entitled to a competency evaluation and evidentiary hearing on the question of his

1. 477 U.S. 399 (1986) (plurality opinion).
2. The Court in *Ford* used the term "insane," but insane is an antiquated term. Today, the terminology is "mental illness" or "mental disorder." *See* Madison v. Alabama, 139 S. Ct. 718, 722 (2019); *Ford*, 477 U.S. at 401.
3. *Ford*, 477 U.S. at 410.
4. 139 S. Ct. 718 (2019). Vernon Madison died of natural causes on Saturday, February 22, 2020.
5. *Id.* at 723, 731.
6. *Id.* at 426.
7. *Id.* at 422.
8. *Id.* at 407.
9. *Id.* at 409.

competency for execution.[10] The Court reasoned that "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate."[11]

In 2007, the Court issued a decision in *Panetti v. Quartman* that interpreted *Ford*'s competency inquiry to mean whether a "prisoner's mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution."[12] In *Panetti*, the U.S. Supreme Court rejected the Fifth Circuit's awareness standard.[13] The Fifth Circuit's standard held that "the test for competency [] require[d] the petitioner know no more than the fact of his impending execution and the factual predicate for his execution."[14] This standard held that delusions are not relevant to whether a prisoner can be executed.[15] The *Panetti* Court held that the Fifth Circuit's standard was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment."[16] The Court reasoned that "[g]ross delusions stemming from a severe mental disorder may put [that] awareness [] in a context so far removed from reality that the punishment can serve no proper purpose."[17] As a result, the Court followed the plurality in *Ford* and provided the standard that prohibits execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications."[18]

Despite the Court's holdings in *Ford* and *Panetti*, the Court's standard is not consistently followed.[19] Courts have imposed the death penalty on defendants suffering from incompetency,[20] dementia,[21] schizotypal personality disorder,[22]and paranoid schizophrenia.[23] The inconsistency within

10. *Id.* at 410–12.
11. *Id.* at 414.
12. *Id.* at 958–59.
13. *Id.* at 956–57.
14. *Id.* at 942.
15. *Id.* at 956.
16. *Id.* at 956–57.
17. *Id.* at 960.
18. *Id.* at 957 (quoting Ford v. Wainwright, 477 U.S. 399, 417 (1986) (plurality opinion)).
19. *See* Robert J. Smith, et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1241–44 (2014).
20. Clayton v. Roper, 515 F.3d 784, 788, 790–91 (8th Cir. 2008) (defendant was convicted of first-degree murder of a police officer and sentenced to death, despite suffering from a severe brain injury and dementia. Dr. Preston, a psychologist on staff at the U.S. Medical Center for Federal Prisoners, evaluated Clayton and concluded he was not competent to assist his attorney, make rational decisions regarding his proceedings, and testify relevantly. The district court, and the Eighth Circuit affirmed, that Clayton was competent to proceed.).
21. Madison v. Alabama, 139 S. Ct. 718, 731 (2019) (the U.S. Supreme Court did not reach a conclusion as to whether the Eighth Amendment prohibits executing a defendant with dementia).
22. Smith v. Spisak, 558 U.S. 139, 142, 153 (2010) (Spisak was convicted of murder and the jury sentenced him to death, even though an expert witness diagnosed Spisak with schizotypal personality disorder and atypical psychotic disorder).
23. Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1321–22, 1344 (11th Cir. 2013) (affirming the trial court's decision below, the Florida Supreme Court affirmed that despite the defendant's diagnosed schizophrenia and prescribed regiment of potent antipsychotic medications, the defendant satisfied *Panetti's* rational understanding standard. The Florida Supreme Court upheld the

various courts is likely a result of the fact that the U.S. Supreme Court's legal definition of insanity is not the same as the medical definition.[24] In *Ford*, the Court concluded that the test for whether a prisoner is insane, for Eighth Amendment purposes, is whether the prisoner is aware of his impending execution and the reason for it.[25] The medical definition of a mental disorder requires the following elements:

> A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior . . . and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.[26]

This definition comes from the Diagnostic and Statistical Manual of Mental Disorders (DSM), which is the handbook used by health care professionals in the United States as the authoritative guide to the diagnosis of mental disorders.[27] The "DSM contains descriptions, symptoms, and other criteria for diagnosing mental disorders."[28] Published in 2013, the DSM-5 is the most recent manual, which acknowledges that no definition adequately specifies precise boundaries for the concept of mental disorder[29] but gives individual criteria for diagnosis of specific mental disorders.[30] For example, an individual must satisfy at least one of the following to be diagnosed with dementia:

> Significant cognitive decline from a previous level of performance in one or more cognitive domains, including learning and memory, language, executive function, complex attention, perceptual-motor, or social cognition; [] cognitive deficits creating interference with independence in everyday activities; [] cognitive deficits that do not occur

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trial court's findings and determination on Ferguson's mental competency based on the three trial court-appointed experts that found Ferguson was malingering. Yet, three of Ferguson's mental health experts found Ferguson incompetent); *Federal Habeas Corpus – Death Penalty – Eleventh Circuit Affirms Lower Court Finding that Mentally Ill Prisoner is Competent to be Executed* – Ferguson v. Secretary, Florida Department of Corrections, 127 HARV. L. REV. 1276, 1277–78 (2014).

24. *See* Ford v. Wainwright, 477 U.S. 399, 417 (1986) (plurality opinion); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013) [hereinafter DSM-5].

25. *Ford*, 477 U.S. at 417.

26. DSM-5, *supra* note 24.

27. *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions (last visited Mar. 20, 2020).

28. *Id.*

29. D.J. Stein et al., *What is a Mental/Psychiatric Disorder? From DSM-IV to DSM-V*, 40 PSYCHOL. MED. 1759, 1763 (2010); *DSM-5: Frequently Asked Questions*, *supra* note 27.

30. *See* DSM-5, *supra* note 24, at 19.

> exclusively in the context of a delirium; and [] lack of a superior explanation for the cognitive deficits.[31]

As a major neurocognitive disorder (NCD), dementia causes a significant decline in at least one cognitive domain.[32] Cognitive domains include executive function, learning and memory, complex attention, language, social cognition, and perceptual-motor function.[33] Cognition is "[t]he mental action or process of acquiring knowledge and understanding through thought, experience, and the senses."[34] "Cognition includes all conscious and unconscious processes by which knowledge is accumulated, such as perceiving, recognizing, conceiving, and reasoning."[35] Major NCD's, such as dementia, severely impair an individual's reasoning, conceiving, and accumulation of knowledge.[36] Thus, an individual suffering from a major NCD is unable to rationally understand how to function in daily life—let alone rationally understand death as a punishment for a crime.[37]

To fulfill the promise of *Ford*, the Court should adopt a categorical rule based on diagnoses of mental illness that have among their symptoms impairment of cognitive domains—such as dementia. A diminished cognitive domain impedes the mental action or process of acquiring knowledge and understanding through thought, experience, and senses. A diminished cognitive domain should create a rebuttable presumption that the defendant lacks a rational understanding of the reasons for his death sentence. Employing this categorical rule would mean that as soon as a defendant is diagnosed with a mental illness where a cognitive domain is impaired, the defendant, as a matter of law, is deemed to lack a rational understanding and is incompetent for execution.

Traditionally, the burden has been on the defendant to prove he lacks a rational understanding and, thus, is incompetent for execution.[38] However, the proposed categorical rule would shift that burden to the state to prove by clear and convincing evidence that the defendant has a rational understanding of why he is being sentenced to death and what death means; despite the defendant's medically diagnosed cognitive impairment. The rebuttable presumption created by this categorical rule would also shift the primary locus of evaluation of competency from the judge to

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31. Brief for the American Psychological Ass'n & American Psychiatric Ass'n as Amici Curiae in Support of Petitioner at 11–12, Madison v. Alabama, 139 S. Ct. 718 (2019) (No. 17-7505) (quoting DSM-5, *supra* note 24, at 602 (internal quotation marks omitted)) [hereinafter *Madison Amicus Brief*].

32. *See* DSM-5, *supra* note 24, at 591, 602.

33. *Id.* at 593–95.

34. *Cognition*, LEXICO, https://www.lexico.com/en/definition/cognition (last visited Mar. 20, 2020).

35. *Cognition*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/cognition-thought-process (last visited Mar. 20, 2020).

36. *See* DSM-5, *supra* note 24, at 602.

37. *See id.*

38. *See* Ford v. Wainwright, 477 U.S. 399, 426 (1986) (Powell, J., concurring).

mental health professionals who are trained to determine a defendant's competency for execution.

If the Court applied this categorical rule, its most recent decision in *Madison* would have aligned with the Eighth Amendment and *Ford*.[39] In *Madison*, the Court held that an individual's failure to remember a crime does not, by itself, excuse that individual from a death sentence.[40] The Court also held that dementia *may* exclude a defendant from the death penalty.[41] However, the Court did not hold that dementia always precludes a defendant from the death penalty.[42] The Court incorrectly decided *Madison*, in part, because the decision violated the *Ford* holding, which ruled that the Eighth Amendment prohibits subjecting mentally ill defendants to the death penalty.[43]

Part I of this Comment begins by reviewing previous decisions where courts sentence defendants suffering from mental illness to the death penalty. Part II summarizes the Court's procedural history, majority opinion, and dissenting opinion in *Madison.* Part III argues that judges are unfit to determine a defendant's competency for execution because they lack the training and expertise of mental health professionals. Part III then transitions to an analysis that explores whether subjecting defendants to the death penalty causes mental illness because defendants sentenced to the death penalty have a high likelihood of developing a mental illness.[44] Finally, Part III argues that the Court should adopt a categorical rule based on diagnoses of mental illness, such as dementia, that impair one or more cognitive domains so that case law will comply with the Eighth Amendment and *Ford*.

I. BACKGROUND

Originally, the death penalty was not reserved for capital offenses—it was employed even for minor offenses such as stealing grapes or killing chickens.[45] Between 1930 and 1972, courts widely imposed the death penalty for rape—455 people were executed for this offense.[46] Though capital punishment is currently authorized in twenty-nine states,[47] the threshold for the death penalty continues to change.[48]

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39. *See* Madison v. Alabama, 139 S. Ct. 718, 731 (2019); *Ford*, 477 U.S. at 399.
40. *See Madison*, 139 S. Ct. at 725.
41. *Id.* at 722.
42. *Id.*
43. *See Ford*, 477 U.S. at 409–10.
44. *See Madison*, 139 S. Ct. at 720–21; *Ford*, 477 U.S. at 401–02.
45. Aurélie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to be Eligible for the Death Penalty?*, 32 CRIM. JUST. 9, 11 (2017).
46. *Race, Rape, and the Death Penalty*, DEATHPENALTYINFO.ORG, https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty (last visited Mar. 20, 2020).
47. *States and Capital Punishment*, NCSL, http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx (last updated June 12, 2019).
48. *See id.*

A. Process of the Death Penalty

Background on the death penalty process is crucial for an understanding of the categorical rule this Comment proposes, because the process is tenuous[49] and unpredictable.[50] The death penalty is first authorized by statute[51] and, once authorized, prosecutors exercise their discretion in deciding whether to move forward with the death penalty.[52] Then, the prosecution must convince an empaneled jury of twelve people to impose the death penalty.[53] Following a jury's decision to sentence a defendant to capital punishment, which is separate from the guilt stage, the applicable judicial system, including any appellate court, approves death sentences that resulted from the trial.[54] Following the appellate process, a death warrant sets a date for the execution.[55] Though a date is set, executions are often postponed.[56] As a result, death row inmates typically await their death for years.[57] If alive at the date of the execution, the final step is the execution itself.[58] The execution is carried out by prison officials.[59]

B. The Court's Initiative to Constrict the Application of the Death Penalty

In 1972, the Court's decision in *Furman v. Georgia*[60] held that, in some instances,[61] the imposition and carrying out of the death penalty

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49. *See* Brandon Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. FORUM 417, 429 (2017) ("[N]o state has successfully hastened the complex process of death penalty appeals and post-conviction review.").

50. John D. Bessler, *Torture and Trauma: Why the Death Penalty is Wrong and Should be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1, 49 (2019).

51. *Id.* at 47 ("In the United States, Congress and state legislatures pass legislation making certain crimes punishable by death, and such legislation is signed into law by the President of the United States and the states' governors.").

52. *Id.* at 47–48.

53. *Id.* at 48; Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 97–98 (2013) ("[T]he guilt stage is followed by the penalty stage, taking place only if the defendant is convicted of the capital crime . . . in death penalty cases, a jury comprised of death qualified community members is responsible for the life or death sentencing decision.") (footnote omitted); *Episode Fourteen: Legal Process*, DEATHPENALTYINFO.ORG, https://files.deathpenaltyinfo.org/legacy/podcast/resources/Episode14LegalProcess.pdf ("If the jury cannot unanimously agree on a sentence, the judge can declare the jury deadlocked and impose the lesser sentence of life without parole. In some states, a judge can still impose a death sentence.").

54. Bessler, *supra* note 50.

55. *Id.* at 51.

56. *Id.* (explaining that executions are often postponed due to one or more stays of execution).

57. *See id.* at 51–52. Consequently, "the suicide rate of death row inmates is about ten times the rate of suicide in the United States as a whole and about six times the rate of suicide in the U.S. general prison population."

58. *Id.* at 53.

59. *Id.* at 53–54 (Though executions are expected to take place at a certain time, executions may be postponed. For example, in 1992, Robert Alton Harris's execution was scheduled for one minute after midnight but was postponed at the last minute for a few hours. Prior to Harris's actual execution, he was strapped in the gas chamber before being temporarily taken out of it).

60. 408 U.S. 238 (1972), *superseded by statute*, GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 26-2201, 26-3301 (1972), *as recognized in* Gregg v. Georgia, 428 U.S. 153, 162–63 (1976).

61. *Furman*, 408 U.S. at at 239–40 (citing three petitioners in which the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments—one petitioner was convicted of murder and two were convicted of rape).

constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[62] Case law furthered the restriction of the imposition of the death penalty in *Gregg v. Georgia*,[63] in 1976.[64] In *Gregg*, the U.S. Supreme Court held that courts cannot automatically[65] impose the death penalty.[66] Rather, courts must consider the character of the defendant and the type of crime committed.[67] In *Gregg*, a Georgia trial court convicted the defendant of armed robbery and murder.[68] The jury sentenced the defendant to death.[69] The defendant appealed and the Georgia Supreme Court affirmed the convictions.[70] The defendant challenged the imposition of his death sentence under the Georgia statute as cruel and unusual punishment under the Eighth and Fourteenth Amendments.[71] Ultimately, the Court held that the punishment of death for murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments.[72]

C. Getting Somewhere in Ford

In 1974, Alvin Ford was convicted of murder and sentenced to death.[73] Beginning in 1982, "Ford began to manifest gradual changes in behavior."[74] Although competent at the time of sentencing, Ford faced pervasive delusions and paranoid schizophrenia while on death row.[75] He developed an obsession with the Ku Klux Klan and believed he was the target of the Klan's conspiracy, which was designed to force him to commit suicide.[76] He believed the prison guards were part of the Klan's conspiracy and that they were "killing people and putting the bodies in the concrete

62. *Id.*
63. 428 U.S. 153 (1976).
64. *Id.* at 154–55.
65. *See id.* at 155 (holding that "before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant.").
66. *Id.* at 154 (holding that (1) the punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments; (2) the Eighth Amendment "forbids the use of punishment that is 'excessive' either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime"; (3) a legislature is not required to select the least severe penalty possible; and (4) capital punishment for the crime of murder is not invalid per se.).
67. *See id.* at 206.
68. *Id.* at 158, 161.
69. *Id.* at 161.
70. *Id.*
71. *See id.* at 162.
72. *Id.* at 155 (concluding that, "[t]he Georgia statutory system under which petitioner was sentenced to death is constitutional. The new procedures on their face satisfy the concerns of Furman, since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. Petitioner's contentions that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by Furman are without merit.").
73. Ford v. Wainwright, 477 U.S. 399, 401 (1986) (plurality opinion).
74. *Id.* at 402.
75. *Id.* at 401–03.
76. *Id.* at 402.

enclosures used for beds."[77] During this time, Ford started referring to himself as "Pope John Paul, III."[78]

Multiple psychiatrists evaluated Ford and reached various conclusions on his mental illness.[79] Beginning with Dr. Jamal Amin, who determined "Ford suffered from 'a severe, uncontrollable mental disease [that] closely resemble[d] "[p]aranoid [s]chizophrenia [w]ith [s]uicide [p]otential"'—a 'major mental disorder . . . severe enough to substantially affect Ford's present ability to assist in the defense of his life.'"[80] Dr. Amin made his diagnosis after fourteen months of evaluating Ford's behavior, "taped conversations between Ford and his attorneys, letters written by Ford, interviews with Ford's acquaintances, and [Ford's] medical records."[81] Ford subsequently refused to see Dr. Amin because he believed Dr. Amin was in on a conspiracy against him.[82] As a result, Ford's counsel appointed Dr. Harold Kaufman.[83] "Dr. Kaufman concluded that Ford had no understanding of why he was being executed, [and] Ford made no connection between the homicide of which he had been convicted and the death penalty."[84] Further, Ford "sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves."[85]

Following Ford's evaluations, Ford's counsel invoked Florida's statutory procedures for determining a condemned prisoner's sanity.[86] Under Florida Code Section 922.07(2), Florida's governor appointed three psychiatrists that evaluated whether Ford had the "mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."[87] After a single, thirty-minute interview, one of the three psychiatrists "concluded that Ford suffered from 'psychosis with paranoia' but had 'enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed on him.'"[88] The second psychiatrist "found that, although Ford was 'psychotic,' he did 'know fully what [could] happen to him.'"[89] The third psychiatrist "concluded that Ford had a 'severe adaptational disorder,' but did 'comprehend his total situation including being sentenced to death, and all of the implications of that penalty.'"[90] The third psychiatrist "believed that Ford's disorder, 'although severe, seemed contrived and recently learned.'"[91] The

77. *Id.*
78. *Id.*
79. *Id.* at 403–04.
80. *Id.* at 402–03.
81. *Id.* at 402.
82. *Id.* at 403.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 403–04.
88. *Id.* at 404.
89. *Id.*
90. *Id.*
91. *Id.*

interviews produced three different diagnoses but questioned the extent of Ford's mental capacity.[92]

After Ford's interviews, each psychiatrist filed a separate report with the governor.[93] Ford's counsel attempted to submit to the Governor other written materials, which included the reports of the two psychiatrists that previously examined Ford.[94] The Governor's office refused to inform counsel whether it would consider the submission.[95] Subsequently, the Governor signed a death warrant without explanation.[96] Ford's counsel then unsuccessfully sought a hearing in state court to determine Ford's competency.[97] As a result, Ford's counsel filed a habeas corpus proceeding in Federal District Court, seeking an evidentiary hearing.[98] The court denied the petition without a hearing and the Court of Appeals for the Eleventh Circuit affirmed.[99] The U.S. Supreme Court then "granted Ford's petition for certiorari in order to resolve whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on [Ford's] claim."[100]

1. The Outcome of *Ford*

The Court found the state's procedures defective because they denied a defendant the "opportunity to challenge or impeach state-appointed psychiatrists' opinions."[101] If a court denied a defendant of this opportunity, there would be "a significant possibility that the ultimate decision made in reliance on those experts [would] be distorted."[102] The Court reasoned it was flawed that the ultimate decision of Florida's statutory procedure rested wholly within the executive branch.[103] Under Florida's statutory procedure, the governor appointed experts and decided whether the state would be able to carry out the death sentence.[104] The Governor's subordinates were "responsible for initiating every stage of the prosecution."[105] The Court concluded the Governor "[could not] be said to have the neutrality that is necessary for reliability in the factfinding proceeding[s]."[106]

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92. *See id.*
93. *Id.* at 413 (following the procedures set forth in the statute, the governor is an actor in this stage of the proceeding).
94. *Id.*
95. *Id.*
96. *Id.* at 404, 413.
97. *Id.* at 404.
98. *Id.*
99. *Id.* at 404–05.
100. *Id.* at 405.
101. *Id.* at 415.
102. *Id.*
103. *Id.* at 416.
104. *Id.*
105. *Id.*
106. *Id.*

2. The Promise of *Ford*

Additionally, the Court held in *Ford* "that the Eighth Amendment prohibits [the] State from [inflicting the death penalty] upon a prisoner who is insane."[107] The Court concluded "that the test for whether a prisoner is insane for Eighth Amendment purposes is whether the prisoner is aware of his impending execution and of the reason for it."[108] "[O]nce a [defendant] makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment . . . entitles him to an adjudication to determine his condition."[109]

II. *MADISON V. ALABAMA*

A. An Unfulfilled Promise

Madison demonstrated that, although the U.S. Supreme Court recognizes an "Eighth Amendment violation in executing juvenile offenders and people with intellectual disabilities, defendants with severe mental illness continue to be sentenced to death and executed."[110] In *Madison*, the Court held that the Eighth Amendment allows the execution of a prisoner even if the defendant cannot remember committing the crime.[111] The Court also held that Madison's diagnosed dementia may preclude execution.[112] However, the Court did not find that Madison was incompetent to be executed and, rather, the Court remanded the case for further proceedings.[113] But for Madison's passing in February of 2020, the trial court could have imposed the death penalty on him.[114]

B. Facts

In 1985, Vernon Madison killed a police officer during a domestic dispute in Mobile, Alabama.[115] "An Alabama jury found him guilty of capital murder, and the trial court sentenced him to death."[116] Beginning in 2015, Madison suffered multiple strokes while on death row and was "diagnosed as having vascular dementia, with attendant disorientation and

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107. *Id.* at 409–10. Distinguishing from the landmark case in 2002, *Atkins v. Virginia*, which held the practice of executing intellectually disabled offenders to be "cruel and unusual," and any state that executes an individual who falls within this classification fails to adhere to the Eighth Amendment. Atkins v. Virginia, 536 U.S. 304, 307, 321 (2002).

108. *Ford*, 477 U.S. at 400.

109. Panetti v. Quarterman, 551 U.S. 930, 934–35 (2007).

110. Mangels, *supra* note 45, at 9; *see* Ward v. Stephens, 777 F.3d 250, 253, 261 (5th Cir. 2015) (explaining that, despite defendant's diagnosed bipolar disorder (including being prescribed lithium since the age of four), "his interest in the 'Illuminati' and his belief that the city singled out and picked on" his family's home, the Texas jury sentenced defendant to death); Ferguson v. Sec'y, Fla. Dep't of Corrections, 716 F.3d 1315, 1320, 1323 (11th Cir. 2013) (affirming the Florida Supreme Court's holding to execute a convicted murderer who was schizophrenic and believed "he had been anointed the 'Prince of God' and would arise following his death to be at the 'right hand of God' . . . .").

111. *See* Madison v. Alabama, 139 S. Ct. 718, 722 (2019).

112. *Id.*

113. *Id.* at 731.

114. *Id.*

115. *Id.* at 723; *id.* at 732 (Alto, J., dissenting).

116. *Id.* at 723.

confusion, cognitive impairment, and memory loss."[117] Madison's mental condition sharply declined as a result of the strokes and vascular dementia.[118]

Due to Madison's strokes, his speech was slurred.[119] He frequently urinated on himself because "no one [would] let [him] out to use the bathroom," even though he had a toilet in his cell.[120] "He talk[ed] of plans to move to Florida" after his release from prison "and [could] only recite the alphabet to the letter G."[121] Madison's declining brain function resulted in his inability "'to rephrase simple sentences,' 'perform simple mathematical calculations either mentally or on paper,' . . . or count by threes."[122] On January 4, 2016, Madison had another stroke, leaving him unresponsive in his prison cell.[123]

C. Procedural History

In 2016, Madison petitioned the Alabama state trial court for a stay of execution on the grounds that he was mentally incompetent—asserting an Eighth Amendment claim that the court preclude his execution because he was unable to recollect committing the murder in 1985.[124] Madison argued that, after his stroke in 2016, "'he no longer understands' the 'status of his case' or the 'nature of his conviction or sentence.'"[125] Alabama countered Madison's argument and claimed "Madison had 'a rational understanding of [the reasons] for his impending execution'" even if he did not remember committing his crime.[126] Thus, Alabama argued, he did not implicate *Ford* and *Panetti*, because those cases were concerned with gross delusions, which Madison did not have.[127]

Following a competency hearing, the trial court found Madison competent for execution.[128] The Eleventh Circuit held that Madison properly exhausted available state court remedies.[129] Additionally, the Eleventh Circuit held that the state court's finding that Madison had a rational understanding that he was going to be executed, because of the murder he committed, was unreasonable.[130] Further, the Eleventh Circuit held that the state court's determination that Madison was competent to be executed "involved an unreasonable application of clearly established federal

117. *Id.*
118. *See id.*
119. Linda Malone, *Too Ill to be Killed: Mental and Physical Competency to be Executed Pursuant to the Death Penalty*, 51 TEX. TECH. L. REV. 147, 158 (2018).
120. Madison v. Comm'r, Alabama Dep't of Corr., 851 F.3d 1173, 1179 (11th Cir. 2017).
121. Malone, *supra* note 119.
122. *Madison Amicus Brief*, *supra* note 31, at 10.
123. *Madison,* 851 F.3d at 1179.
124. Madison v. Alabama, 139 S. Ct. 718, 723 (2019).
125. *Id.*
126. *Id.* at 723–24.
127. *Id.*
128. *Id.* at 724.
129. Madison v. Comm'r, Ala. Dep't of Corrs., 851 F.3d 1173, 1178–79 (11th Cir. 2017).
130. *See id.* at 1178.

law."[131] As a result, the Eleventh Circuit reversed the district court's decision and granted Madison relief.[132]

On federal habeas corpus review, the U.S. Supreme Court reversed the Eleventh Circuit's grant of relief, holding that neither *Ford* nor *Panetti* established a prisoner is incompetent for execution after failure to remember the crime committed.[133] In 2018, Alabama set a date for Madison's execution.[134] Madison then returned to state court and argued his mental condition precluded the state from going forward.[135] Again, the state court found Madison mentally competent for execution.[136] The U.S. Supreme Court granted certiorari.[137]

D. Majority Opinion

Justice Kagan authored the opinion of the Court, in which Justice Roberts, Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined.[138] The Court held that the Eighth Amendment does not forbid the execution of a prisoner with a mental disorder, which left him without memory of his crime.[139] The majority reasoned that, when a person lacks memory, he "may still able to form a rational understanding of the reasons for his [execution],"[140] and that "the Eighth Amendment appl[ied] similarly to a prisoner suffering from dementia as to one experiencing psychotic delusions."[141] However, the Court explained that either diagnosis may or may not impede the required comprehension of his punishment.[142] Additionally, "neither *Ford* nor *Panetti* 'clearly established' 'that a prisoner is incompetent [for execution]' because of a simple failure to remember his crime."[143] Because of this, the Court held that the state court did not act "unreasonably" when it found Madison had the necessary understanding for execution.[144]

The majority concluded that Madison's memory loss, by itself, did not prevent a rational understanding of the state's reason for his execution.[145] Rather, "[w]hat matters is whether a person has the 'rational understanding' *Panetti* requires—not whether he has any particular memory

131. *Id.* at 1188.
132. *Id.* at 1178.
133. *Madison*, 139 S. Ct. at 725.
134. *Id.*
135. *Id.*
136. *Id.* at 726.
137. *Id.*
138. *Id.* at 719–21.
139. *Id.* at 722.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 725 (quoting Dunn v. Madison, 138 S. Ct. 9, 11–12 (2017)).
144. *Id.*
145. *Id.* at 726–27.

or any particular mental illness."[146] The Court further reasoned that *Panetti*'s decision was about understanding—not memory.[147]

Although the majority held that "[m]oral values do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall," the majority still considered memory loss a factor under *Panetti*'s rational understanding standard.[148] However, the Court determined that memory loss is considered a factor only when combined with another mental illness, meaning it is only relevant when a defendant cannot comprehend the reason for his execution.[149] When examining the mental illness of a defendant, the Court noted the *Panetti* standard does not look at the precise cause of the mental illness.[150] Rather, it looks at the effect of the mental illness, specifically whether the defendant's mental illness prevents a rational understanding of why the state intends to enforce the death penalty.[151]

Further, the majority stated a person who is unable to remember their crime may be able to "recognize the retributive message society intends to convey with a death sentence."[152] The majority compared a person unable to recall the Civil War to Madison; a person unable to recall his crime.[153] The majority believed that, even without a memory of a particular event, a person is still able to "reach a rational—indeed, a sophisticated—understanding of that conflict and its consequences."[154] The majority acknowledged that dementia is a mental condition causing *cognitive* decline and disorientation, preventing a defendant from having a rational understanding for his or her execution.[155] Yet, the majority stated that "dementia also has milder forms, which allow a person to preserve that understanding."[156]

Lastly, the majority explored whether Madison's execution could go forward based on the state court's decision below. Alabama believed "that Madison had 'a rational understanding of the reasons for his impending execution' . . . even assuming he had no memory of committing the crime."[157] The majority did not provide a definitive answer to this question.[158] Instead, the Court remanded the case to the state court for renewed consideration of Madison's competency.[159] The Court explained that it was unsure if "the state court properly understood the Eighth Amendment

146. *Id.* at 727.
147. *Id.*
148. *Id.*
149. *Id.* at 727–28.
150. *Id.* at 728.
151. *Id.*
152. *Id.* at 727.
153. *Id.*
154. *Id.*
155. *Id.* at 729.
156. *Id.*
157. *Id.* at 723–24.
158. *Id.* at 731.
159. *Id.*

bar when assessing Madison's competency."[160] The Court criticized Alabama's 2016 opinion that only prisoners suffering from delusional disorders qualified as incompetent under *Panetti*.[161] The majority stated that "th[is] 2016 opinion [] d[id] not show that the state court realized [people] suffering from dementia could satisfy the *Panetti* standard."[162] The Court criticized Alabama's reliance on the state's preferred expert testimony from a psychologist, highlighting "Madison's lack of 'psychosis, paranoia, or delusion' while never mentioning [or considering] his dementia."[163] The Court believed this was a "too-limited understanding" of *Panetti*.[164]

In sum, the majority made two points clear.[165] "First, under *Ford* and *Panetti*, the Eighth Amendment may permit executing Madison even if he cannot remember committing his crime."[166] Second, "the Eighth Amendment may prohibit executing Madison even though he suffers from dementia."[167] Madison's competency evaluation depended on "whether he [could] reach a 'rational understanding' of why the [s]tate want[ed] to execute him."[168]

E. Dissenting Opinion

Justice Alito authored a dissenting opinion with three central arguments, which was joined by Justice Thomas and Justice Gorsuch.[169] First, Justice Alito contended that U.S. Supreme Court Rule 14.1(a) made clear that the Court "grant[s] certiorari to decide the specific question or questions of law set out in a petition for certiorari."[170] The dissent argued that Madison "abruptly changed course" and "switched to an entirely different argument."[171] Madison's first argument asked whether "the Eighth Amendment prohibit[s] the execution of a murderer who cannot recall committing the murder for which the death sentence was imposed."[172] Madison's new argument stated that the "state court rejected the petitioner's claim that he is incompetent to be executed because the court erroneously thought that dementia, as opposed to other mental conditions, cannot provide a basis for such a claim."[173] The dissent criticized the Court for allowing review, stating the Court previously dismissed the writ as "improvidently granted" when counsel switched their question.[174] Nonetheless, the dissent argued that the majority "vacate[d] the judgment below

160. *Id.* at 730.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 731.
166. *Id.*
167. *Id.*
168. *Id.* (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)).
169. *Id.* (Alito, J., dissenting).
170. *Id.* at 732.
171. *Id.* at 731.
172. *Id.*
173. *Id.* at 731–32.
174. *Id.* at 732.

because it [was] unsure whether the state court committed the error claimed in petitioner's merits brief."[175] Criticizing the majority's reasoning, the dissent believed the Court incorrectly reversed the Eleventh Circuit's ruling based on Madison's inability to remember his crime.[176]

Second, the dissent stated the majority's argument was insupportable because the petition to the Court did not raise the argument on which the Court granted relief.[177] The majority read the petition as a claim based on an impermissible distinction between dementia and other mental conditions.[178] However, the dissent claimed that the petition sought review concerning the effect of memory on an Eighth Amendment analysis.[179] The dissent, again, relied on U.S. Supreme Court Rule 14.1(a) and said that, because the petition did not raise the argument on which the Court granted relief, the Court's decision violated the rule that the Court would only consider the questions set out in the petition.[180]

Third, the dissent argued that, even if it were proper for the Court to consider the petition set forth, there was little reason to think that the order below was based on an erroneous distinction between dementia and other mental conditions.[181] "The majority worrie[d] that the state-court judge may not have applied the same standard in 2018 as he had two years earlier and might have viewed 'insanity' as something narrower than the standard mandated by *Ford* and *Panetti*."[182] The dissent believed this concern was unfounded because what the state court meant by insanity was what this Court termed insanity in *Ford* and *Panetti*—a defendant suffers from insanity if the defendant does not understand the reason for his execution.[183] The dissent continued to say that the majority gave weak reasoning for its uncertainty as to the state's use of insanity.[184] The dissent reasoned that the majority "distort[ed] what the [s]tate's brief in opposition attempted to say about the term 'insane.'"[185] The "[s]tate's point was that a defendant is not 'insane' in that sense merely because he cannot remember committing the crime for which he was convicted."[186]

Additionally, the dissent criticized the majority's other proffered basis for doubt, which was that the state "repeatedly argued to the [state] court (over Madison's objection) that only prisoners suffering from delusional disorders could qualify as incompetent under *Panetti*."[187] Without a

175. *Id.*
176. *Id.* at 735–38.
177. *Id.* at 734.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 735.
183. *Id.*
184. *Id.*
185. *Id.* at 736.
186. *Id.*
187. *Id.*

cite to where the state made such an argument, the dissent contended that this was not what counsel for the state said or wrote.[188] Even if the state made such an argument, the dissent argued that what mattered was the basis for the state court's decision.[189]

Though the dissent acknowledged that Madison "suffers from severe physical and mental problems," it believed the question of whether Madison was capable of understanding the reason for his execution was litigated below.[190] The dissent concluded that the writ should be dismissed as improvidently granted based on the lower court's decision and Madison's abandonment of the question on which he persuaded the Court to grant review.[191]

III. ANALYSIS

In *Madison* the Court correctly decided that Madison's failure to remember his crime was not enough to prohibit the state from executing him.[192] However, the Court decided that Madison's dementia *may* exclude him from the death penalty.[193] Madison's dementia should create the rebuttable presumption that he lacked the rational understanding of his death sentence.[194]

Since 1986, in *Ford*, the Court prohibits a state from inflicting the death penalty on someone whose mental illness prevents him from comprehending the reasons for his penalty or its implications.[195] Madison's dementia resulted in a lack of understanding and comprehension.[196] Madison's dementia prevented him from comprehending his death sentence because his dementia affected the central role of his cognition.[197] Dementia affected Madison's executive functioning, causing him to rely on others to make decisions.[198] His dementia may have caused him to make decisions without regard to safety and without insight into how his mental state was deteriorating.[199] Without comprehension of daily activities and actions, it was likely Madison did not have comprehension of his death sentence. Thus, the Court should have followed *Ford* and exempted Madison from the death penalty.

This Part will argue that judges' lack of expertise on mental illness makes them unfit to determine a defendant's competency. Second, this Part will analyze a question arising out of cases such as *Madison* and *Ford*,

188. *Id.* at 736–37.
189. *Id.*
190. *Id.* at 738.
191. *Id.*
192. *See id.* at 727–28.
193. *See id.* at 728–29.
194. *See* Ford v. Wainwright, 477 U.S. 399, 422 (1986) (Powell, J., concurring).
195. *See id.* at 399.
196. *See Madison*, 139 S. Ct. at 723–24 (Alto, J., dissenting).
197. *See* DSM-5, *supra* note 24, at 610.
198. *See id.* at 593, 610.
199. *See id.* at 595.

which asks if the death penalty causes mental illness. Finally, this Part will argue that the Court should adopt a categorical rule where the burden shifts to the state to prove that the defendant has a rational understanding once diagnosed with a mental illness that impairs the defendant's cognitive domain(s). Defendants with these diagnoses have a mental illness that results in an established lack of comprehension and understanding and, thus, as ruled in *Ford*, the Court should exempt these defendants from the death penalty.

A. Judges Are Unfit to Determine a Defendant's Competency

Though a defendant falls under the competency standard set forth in *Ford*, if the defendant has a mental illness preventing him from comprehending the reasons for his penalty or its implications, judges are not fit to make this finding.[200] Despite judges' large breadth of knowledge of law, exposure to expert testimony from mental health professionals, and competency evaluations from medical professionals, they do not have the expertise to evaluate the competency of a mentally ill defendant.[201] Even so, the determination of a defendant's competence is ultimately a judicial decision.[202] The consequence of this is that a trained mental health professional may determine a defendant is incompetent, but a court may decide otherwise.[203]

A mental health professional's expertise on mental illness makes them more qualified to answer the question of competency.[204] Mental health professionals are trained to consider factors such as whether reported symptoms are consistent with what is known about mental disorders, the prisoner's presentation of the symptoms over time and identifying exaggerated symptoms through psychological tests—among these assessments includes the DSM-5.[205] A diagnosis of a mental disorder requires "clinical training to recognize when the combination of predisposing, precipitating, perpetuating, and protective factors has resulted in a psychopathological condition in which physical signs and symptoms exceed normal ranges."[206] A patient's diagnosis "must involve a careful clinical history and concise summary of the social, psychological, and

200. *See Ford*, 477 U.S. at 417; Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 200 (2004) (quoting Patricia A. Zapf et al., *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?*, 4 J. FORENSIC PSYCHOL. PRAC. 27, 35 (2004)).

201. *See* DSM-5, *supra* note 24, at 25; Morris et al., *supra* note 200. This is not to say that all judges lack the training and expertise of a mental health professional but, generally speaking, judges are not required nor trained to diagnose a mental disorder.

202. Melissa L. Cox & Patricia A. Zapf, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions About Competency*, 28 LAW & PSYCHOL. REV. 109, 111 (2004); *see* Mark A. Gallagher, *Competence to Stand Trial*, 73 GEO. L.J. 518, 520–22 (1984).

203. *Id.*

204. Morris et al., *supra* note 200.

205. *Madison Amicus Brief*, *supra* note 31, at 17; *see Understanding Your Diagnosis*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Find-Support/Living-with-a-Mental-Health-Condition/Understanding-Your-Diagnosis (last visited Mar. 20, 2020).

206. DSM-5, *supra* note 24, at 19.

biological factors that may have contributed to developing a given mental disorder."[207]

Though courts may use the DSM-5 to assist in the evaluation of a defendant's competency, the "[u]se of DSM-5[208] to assess for the presence of a mental disorder by nonclinical, nonmedical, or otherwise insufficiently trained individuals is not advised"—the DSM-5 only *assists* legal decision makers in their determinations.[209] It should be used solely "as a reference for the courts [] in assessing the forensic consequences of mental disorders"—not as a definitive manual.[210] Nor was the DSM-5 made for the needs of the courts and legal professionals.[211] Rather, it "was developed to meet the needs of clinicians, public health professionals, and research investigators."[212]

Despite receiving reports and competency evaluations from mental health professionals, the ultimate decision regarding competency rests with the court.[213] This power allows courts to decide a defendant is competent, despite a mental health professional concluding otherwise.[214] Giving mental health professionals the ability to make the final determination as to a defendant's competency would prevent this inconsistency, which would further protect defendants deemed incompetent.

1. Judges are Unfit to Determine Madison's Competency

In *Madison*, the Court wrestled with whether a delusional disorder was a prerequisite to declaring a mentally ill person incompetent to be sentenced to death.[215] The Court believed that Madison understood the reasons for his impending execution, despite suffering from vascular dementia that resulted in disorientation, confusion, cognitive impairment, and memory loss.[216] The U.S. Supreme Court's majority opinion downplayed Madison's deteriorating mind to say "dementia also has milder forms, which allow a person to preserve that understanding."[217] Furthermore, at the trial court level, only two experts were used to evaluate Madison's mental state.[218] The state focused on the expert that said Madison was not delusional or psychotic.[219] This expert concluded Madison was able to recount the details and history of his case and seemed to understand his legal

207. *Id.*
208. The DSM is the handbook used by health care professionals in the United States as the authoritative guide to the diagnosis of mental disorders.
209. DSM-5, *supra* note 24, at 25 (internal footnote added).
210. *See id.*
211. *Id.*
212. *Id.*
213. Cox & Zapf, *supra* note 202; *see* Gallagher, *supra* note 202.
214. *See* Clayton v. Roper, 515 F.3d 784, 789 (8th Cir. 2008) (the district court disagreed with "Dr. Lea Ann Preston, a psychologist on the staff at the United States Medical Center for Federal Prisoners," that Clayton was incompetent).
215. *See* Madison v. Alabama, 139 S. Ct. 718, 730–31 (2019).
216. *See id.* at 723.
217. *See id.* at 729.
218. *Id.* at 724.
219. *Id.*

situation.[220] Although the Court properly evaluated the state's discrepancy in testimony to say it may have given an "incorrect view of the relevance of delusions or memory," the courts struggled to form their opinions of Madison's competency.[221] This furthers the argument that judges are unfit to determine a defendant's competency.

B. Death Row Results in Mental Illness

The death penalty furthers the problem that *Ford* and *Panetti* attempted to prevent, because defendants become mentally ill after sentenced to death.[222] Not only this, but, "most jails and prisons do not conform to nationally accepted guidelines for mental health screening and treatment."[223] The result of unfollowed guidelines is that mentally ill prisoners are left untreated.[224] A government report, presented at the First Reentry Courts Initiative Cluster Meeting in Washington, DC, "[e]xamin[ed] the status of mentally ill state prisoners [scheduled] to be released within [twelve] months."[225] The study found that 43% of the prisoners did not receive any treatment.[226] Lack of treatment is an issue, as well as the mental illnesses that defendants develop while on death row.[227]

Defendants subjected to solitary confinement develop "symptoms of declining mental health, even if they enter solitary confinement in a mentally healthy state."[228] "[D]eath row syndrome" is used to describe the effects of death row on individuals."[229] "While on death row, prisoners are locked in small cells in complete isolation for twenty-two to twenty-four hours a day" with "reduced or no natural light[] and severe constraints on visitation, including the inability to [] touch friends or loved ones."[230] Many prisoners go years without access to fresh air, sunshine, and regular movement—basic needs people need to maintain their mental and physical health.[231] Death row inmates are extremely isolated in cells that are the size of an average bathroom, not because of their conduct in prison or any

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220. *Id.*

221. *See id.* at 729–31.

222. *See, e.g.*, Madison, 139 S. Ct. at 723; *see also* Mangels, *supra* note 45, at 14.

223. Steven K. Hoge, *Providing Transition and Outpatient Services to the Mentally Ill Released from Correctional Facilities*, *in* PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 461, 469 (Robert Greifinger ed., 2007) (quoting NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON TO BE RELEASED INMATES xii (2002)).

224. *Id.*

225. *Id.* at 469, 475 (In 2000, A.J. Beck presented the report, State and federal prisoners returning to the community: Findings from the Bureau of Justice Statistics.).

226. *Id.* at 469.

227. *See* Amy Smith, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 249 (2008).

228. Ashley Halvorsen, *Solitary Confinement of Mentally Ill Prisoners: A National Overview & How the ADA Can be Leveraged to Encourage Best Practices*, 27 S. CAL. INTERDISC. L.J. 205, 208 (2017).

229. Smith, *supra* note 227, at 238.

230. AM. C.L. UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 2 (2013); Kelly K. Holder, *Confined to a Concrete Cave: The Row Torture of Warren Lee Hill*, 7 ELON L. REV. 591, 598 (2015).

231. *See* AM. C.L. UNION , *supra* note 230, at 2, 5.

demonstrated dangerousness to staff or other prisoners, but due to their sentences alone.[232] The "conditions of solitary confinement worsen the symptoms of mental illness, including increased hallucinations, self-harm, and suicide attempts."[233] Exposing prisoners to these conditions has the potential to result in various negative physiological and psychological reactions, including illusions, lack of impulse control, chronic depression, talking to oneself, and confused thought processes.[234]

In *Ford*, the trial court sentenced Alvin Ford to death in 1974, but he did not develop extreme delusions and confused perceptions until 1982.[235] In 1983, psychiatrists diagnosed Ford with a "severe, uncontrollable, mental disease which closely resembles 'Paranoid Schizophrenia [w]ith [s]uicide [p]otential'—a 'major mental disorder.'"[236] Additionally, in *Madison* the trial court sentenced the defendant to death in 1985, but his mental state recently changed.[237] In 2015, Madison's mental condition sharply deteriorated, leading to strokes and vascular dementia.[238]

Because of the conditions death row inmates such as Madison face, and the effects resulting from them, simply subjecting mentally ill defendants to death row (awaiting execution) may be described as cruel and unusual punishment in and of itself.[239] The Court has continuously held that "human dignity underlies the prohibition against cruel and unusual punishment."[240] Limiting death row inmates from fresh air, and depriving them of anything more than a windowless cell, strips individuals of their dignity.[241] Just as the Court has held that imposing the death penalty on mentally ill defendants is against the Eighth Amendment,[242] the total isolation defendants face while on death row is also cruel and unusual punishment.[243]

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232. *Id.* at 2, 4.

233. Halvorsen, *supra* note 228, at 228.

234. AM. C.L. UNION, *supra* note 230, at 6–7 (stating that other reactions include increased anxiety, nervousness, fears of persecution, appetite loss, heart palpitations, withdrawal, blunting of affect and apathy, problems sleeping, nightmares, self-mutilation, and "[l]ower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement"); Halvorsen, *supra* note 228, at 207–08.

235. Ford v. Wainwright, 477 U.S. 399, 401–02 (1986).

236. *Id.* at 402–03.

237. Madison v. Alabama, 139 S. Ct. 718, 723 (2019).

238. *Id.*

239. *See* AM. C.L. UNION, *supra* note 230; Malone, *supra* note 119, at 149.

240. Shelby Calambokidis, *Beyond Cruel and Unusual: Solitary Confinement and Dignitary Interests*, 68 ALA. L. REV. 1117, 1134 (2017) (quoting Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 773 (2006)).

241. *See* Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 495–96 (2014).

242. Ford v. Wainwright, 477 U.S. 399, 410 (1986).

243. *See* Calambokidis, *supra* note 240, at 1132–33.

1. What About Prisoners that Fake their Illness?

"Often, if a defendant appears sane, it [may be] assumed that they are faking [an] illness to avoid [a harsher] punishment."[244] However, in cases such as *Madison*, mental health professionals can use brain imaging to diagnose vascular injury.[245] "Precise neuroimaging, coupled with an understanding of a patient's medical history, also allows medically trained professionals to assess the extent and location of a patient's brain damage, and to determine what cognitive effects could be expected from this brain damage."[246] Where prisoners may be able to fake certain illnesses, medical technology provides an accurate evaluation of a defendant's capacity to appreciate information—appreciating information is a key component of rational understanding.[247]

C. Categorical Rule in Action

The categorical rule that this Comment sets forth requires the courts to follow the lead of medical science in evaluating the cognitive capacitation of people sentenced to death. This categorical rule implements the *Ford* and *Panetti* standards by creating a rebuttable presumption that the defendant does not rationally understand the reasons for his death sentence and what death means if the defendant is diagnosed with a mental illness that, by definition, impairs his or her cognitive capacity—the ability to understand. This would shift the burden to the state to prove, by clear and convincing evidence, that, despite this cognitive impairment, the defendant has a rational understanding of why he or she is being sentenced to death and what death means.[248] This categorical rule does not seek to free defendants of punishment; rather, it seeks to free mentally ill defendants from execution.[249]

1. The Categorical Rule Applied to Madison

It is undisputed that Madison suffered from dementia.[250] Madison's plans to move to Florida, and his incomprehension that his mother was no longer alive, demonstrated that Madison was incapable of understanding that being sentenced to death means he would die at the hands of the state.[251] These delusions interfered with Madison's rational understanding of his punishment and its relationship to his conviction because he did not remember the facts of his crime, his arrest, or even the victim's identity.[252]

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244. Maurice Chammah, *Crazy or Faking It?*, MARSHALL PROJECT, https://www.themarshallproject.org/2014/11/26/crazy-or-faking-it (last updated Dec. 1, 2014, 11:44 AM).

245. *Madison Amicus Brief*, *supra* note 31, at 13–14.

246. *Id.* (citing Raj N. Kalaria, et al., *Stroke Injury, Cognitive Impairment, and Vascular Dementia*, 1862 BIOCHIMICA ET BIOPHYSICA ACTA 915, 915 (2016)).

247. *Madison Amicus Brief*, *supra* note 31, at 14.

248. *See* Panetti v. Quarterman, 551 U.S. 930, 955 (2007); Ford v. Wainwright, 477 U.S. 399, 416–18 (1986).

249. *See Ford*, 477 U.S. at 422.

250. Madison v. Alabama, 139 S. Ct. 718, 723 (2019).

251. *See* Malone, *supra* note 119, at 158.

252. *Madison Amicus Brief*, *supra* note 31, at 10.

Additionally, he did not believe that he killed anybody.[253] As a result, Madison's dementia impaired his cognitive domains to the point where he was unable to form a rational understanding of his punishment and the penalty for his crime.[254]

Madison's dementia resulted in memory loss and an inability to form a rational understanding of his punishment, but the Court unnecessarily separated the two within its analysis.[255] The Court in *Madison* reiterated that the *Ford* and *Panetti* standards must involve more than a defendant's simple failure to remember the crime he committed—assuming the defendant has no other cognitive impairment.[256] Accordingly, the Court should have presumed that Madison's memory loss involved more than just his failure to remember his crime.[257] Based on the DSM-5 definition of dementia—requiring a substantial decline in at least one cognitive domain—the Court should have analyzed Madison's memory loss as a symptom of his dementia, rather than as a separate evaluation from his dementia.[258]

If the Court applied the proposed categorial rule to Madison, it would create a rebuttable presumption that Madison lacked a rational understanding and was incompetent for execution. The state would then have the burden to prove that Madison rationally understood his death sentence and the reasons for it. Based on the effects of Madison's dementia, this would be a difficult burden to overcome. If the Court applied this categorical rule to Madison, the promise of *Ford* would not be ignored, and Madison would not have been subjected to the death penalty.

CONCLUSION

Mentally ill defendants are subjected to the death penalty despite the Eighth Amendment's ban on cruel and unusual punishment. Rather than helping those that suffer from a mental illness, the focus is on whether a defendant is competent for execution. However, it is unfair to assume mentally ill defendants are able to rationally understand their execution. Judges are unfit to make this determination, because they often lack the training and expertise of mental health professionals. Additionally, merely subjecting a prisoner to death row can create mental illnesses in a once healthy defendant. As demonstrated in *Ford* and *Madison*, defendants sentenced to the death penalty have a high likelihood of developing a mental illness.

As a result, the Court should adopt a categorical rule based on diagnoses of mental illnesses that cause impairment of one or more cognitive domains, such as dementia. Once a defendant is diagnosed with a mental

253. *Id.*
254. *See* Madison v. Comm'r, Alabama Dep't of Corr., 851 F.3d 1173, 1180 (11th Cir. 2017).
255. *Madison*, 139 S. Ct. at 727.
256. *See id.* at 727–28.
257. *See id.*
258. *See* DSM-5, *supra* note 24, at 591.

illness where a cognitive domain is impaired, there is a rebuttable presumption that this defendant lacks a rational understanding. A lack of rational understanding deems the defendant incompetent for execution. When a defendant lacks a rational understanding, the burden should shift to the state to prove, by clear and convincing evidence, that the defendant has a rational understanding of why he is being sentenced to death and what death means. Defendants with these diagnoses have a mental illness that results in a lack of comprehension and understanding and, thus, as ruled in *Ford*, these defendants should be exempt from the death penalty.

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